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No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington State Court of Appeals, Division III

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that findings that impact the length of criminal sentences are made according to constitutionally required procedures.

The Washington Association of Criminal Defense Lawyers (WACDL) is a non-profit corporation organized in 1987, and it has 730 criminal defense lawyer members in the State of Washington. It is a state affiliate of NACDL, and it shares its mission on behalf of criminal defense lawyers in the State of Washington.

The NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases applying *Apprendi*. *See, e.g.*, *United States v. Cotton*, 535 U.S. 625 (2002). Because the decision below is contrary to the rule set forth by this Court in *Apprendi*, the NACDL and the WACDL respectfully submit this brief *amici curiae* in support of Petitioner.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Where a state sentencing scheme requires the existence of aggravating factors in order to impose a sentence in excess of statutorily imposed sentencing guidelines, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), mandates that such factors be found by a jury beyond a reasonable doubt. Where, as here, these factors are found only by a judge under a preponderance of evidence standard, *Apprendi* does not allow a sentence in excess of the statutory guideline range.

Apprendi holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The aggravating factors found in this case increased Petitioner's sentence beyond the maximum allowed by the statutory sentencing guidelines. Thus, these facts are precisely the sort that must be proven to a jury beyond a reasonable doubt. Imposing an exceptional sentence based solely on a ***judge's*** finding of aggravating factors under a ***preponderance*** standard contravenes *Apprendi*'s fundamental holding. This is of particular concern under Washington's system, where exceptional sentences may be based on separate, uncharged crimes that were never put to a jury or proven beyond a reasonable doubt.

The Washington courts mistakenly reason that *Apprendi* does not apply because another statutory provision limits the total sentence in the event a sentence in excess of the standard range is imposed. But to accept this logic would render *Apprendi* meaningless – a state could circumvent *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.

Accordingly, this Court should correct the Washington courts' mistaken application of *Apprendi*. This Court should adopt the reasoning of the Kansas Supreme Court, which correctly held that *Apprendi* required a jury finding beyond a reasonable doubt in order to impose a sentence in excess of a statutory standard sentencing range. The Kansas courts' approach is based on a straightforward application of *Apprendi*'s clear holding that facts necessary to impose a sentence in excess of the maximum sentence otherwise available must be found by a jury beyond a reasonable doubt.

ARGUMENT

I. *Apprendi* Requires that Any Fact Necessary for a Sentence in Excess of a Statutory Standard Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt.

Under Washington's sentencing statute, the court must impose a sentence within the statutory guidelines range unless it finds that "aggravating factors" justify an exceptional sentence upward. *State v. Gore*, 143 Wash. 2d 288, 313, 21 P.3d 262 (2001); *see also* Wash. Rev. Code § 9.94A.120(1), (2) (2000) (providing that "the court ***shall*** impose a sentence within the sentence range for the offense" unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence") (emphasis added).[2] The existence of such aggravating factors is precisely the kind of finding that must be made by a jury beyond a reasonable doubt under *Apprendi*. Washington law, however, allows

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[2] Although Washington has recently recodified parts of its sentencing laws, the provisions governing exceptional sentences in excess of the statutory standard range remain the same. *See* Wash. Rev. Code §§ 9.94A.505(2)(a)(i), 9.94A.535 (2002).

such findings to be made by a judge, under a preponderance of the evidence standard. *See id.* § 9.94A.370(2) (2000).

In this case, the exceptional sentence was based on the aggravating factor of domestic violence committed with deliberate cruelty and within the sight or sound of the victim's minor child. *See* Wash. Rev. Code § 9.94A.390(2)(h)(ii), (iii) (2000).[3] This factor – and this factor alone – enabled the court to impose a sentence in excess of the statutory maximum set forth in Washington's sentencing guidelines. As a result, Petitioner received a 90-month sentence, more than ***three years*** longer than the maximum sentence allowed by the statutory standard range absent a finding of aggravating factors.

Under *Apprendi*, the facts underlying such a deviation from a statutory standard sentencing range must be found by a jury beyond a reasonable doubt:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

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[3] The trial court also found "deliberate cruelty" to be an independent, additional aggravating factor, *see* Wash. Rev. Code § 9.94A.390(2)(a) (2000), but the appellate court affirmed only the domestic-violence-plus-deliberate-cruelty aggravator. *See* Pet. App. 16a-17a.

Apprendi, 530 U.S. at 490 (citations and quotation marks omitted).

Thus, *Apprendi* dictates that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494 (footnote omitted). The answer to that question in this case is an unequivocal yes. The court's finding of aggravating factors exposed Petitioner to a sentence greater than the statutory maximum sentence he would have faced absent such factors. These aggravating factors are what "increase[d] the prescribed range of penalties to which [Petitioner was] exposed." *Id.* at 490.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court explained *Apprendi* as follows:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty ***exceeding*** the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Id. at 602 (citing *Apprendi*, 530 U.S. at 482-83) (emphasis in original) (quotation marks omitted).

Washington's statutory sentencing scheme provides that "the court ***shall*** impose a sentence within the sentence range for the offense" unless aggravating factors exist. Wash. Rev. Code § 9.94A.120(1), (2) (2000) (emphasis added). Thus, imposing a sentence beyond the guideline range is "contingent on the finding" of such aggravating

factors and, under *Apprendi*, this finding must be made "by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

This Court's application of this straightforward principle to the facts of *Apprendi* is instructive. Mr. Apprendi pled guilty to unlawful possession of a firearm, the sentencing range for which was 5 to 10 years. *See Apprendi*, 530 U.S. at 468. At sentencing, the state court found by a preponderance of the evidence that Apprendi's crime was racially motivated, and enhanced Apprendi's sentence under New Jersey's hate crime statute. *See id.* at 471. Based on this finding, the court sentenced Apprendi to a 12-year prison term. *Id.*

This Court held that the hate crime finding could not be the basis for enhancing Apprendi's sentence beyond the statutory maximum for his gun possession offense, where that finding had not been made by the jury beyond a reasonable doubt. It reasoned:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Id. at 476. Here, the State of Washington threatened Petitioner with certain pains (the statutory standard guidelines) for kidnapping a person. It threatened him with

additional pains (an exceptional sentence beyond the maximum allowed by those guidelines) for exercising deliberate cruelty in connection with domestic violence. Thus, as in *Apprendi*, a jury finding beyond a reasonable doubt is necessary to authorize a sentence beyond the maximum set forth in the statutory standard range.

The Kansas Supreme Court has already recognized that *Apprendi* applies to sentences in excess of statutorily imposed standard sentencing ranges. In *State v. Gould*, 23 P.3d 801 (Kan. 2001), the Kansas Supreme Court correctly held that *Apprendi* requires that the aggravating factors underlying such an enhanced sentence must be proven to a jury beyond a reasonable doubt. *See Gould*, 23 P.3d at 812-13.[4] The Kansas court reasoned that "[u]nder *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict." *Id.* (citing *Apprendi*, 530 U.S. at 469, 490-96). Where the existence of aggravating factors has not been decided by a jury beyond a reasonable doubt, the only "authorized"

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[4] The sentencing schemes in Washington and Kansas are structurally identical. Both contain a statutorily imposed sentencing grid that establishes presumptive sentencing ranges. *See* Wash. Rev. Code §§ 9.94A.310 & 370 (2000); *Gould*, 23 P.3d at 811. Both condition any upward departure from the standard range on a finding of one or more aggravating factors. *See* Wash. Rev. Code §§ 9.94A.120 (2000); *Gould*, 23 P.3d at 812 (citing Kan. Stat. Ann. § 21-4716(a)). Both provide that such aggravating factors must be substantial, compelling, and not already included in the elements of the underlying offense. *See Gore*, 143 Wash. 2d at 315-16; *Gould*, 23 P.3d at 812 (quoting Kan. Stat. Ann. § 21-4716(b)). And both provide additional statutory limits on the total sentence that may be imposed when the court departs from the standard guidelines range. *See* Wash. Rev. Code § 9A.20.021(1) (2000); *Gould*, 23 P.3d at 812.

sentence is the one set forth in the presumptive sentencing grid. *See id.* at 813. In that situation, the court violates *Apprendi* if it imposes a sentence "beyond the maximum sentence in the applicable grid box." *Id.*

II. The Washington Courts' View Of *Apprendi* is Wrong and, if Accepted, Would Render *Apprendi* Meaningless.

Washington courts, including the court below, have consistently rejected attempts to apply *Apprendi* to exceptional sentences in excess of the statutory standard range.[5] The two rationales relied on by Washington courts are fundamentally mistaken. First, the presence of a separate statutory provision that caps the size of any exceptional sentence for particular felonies does not somehow exempt such sentences from *Apprendi*'s mandate. Second, this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), does not apply where, as here, the sentence imposed is not authorized without the finding of an aggravating factor.

1. Washington state courts have erroneously concluded that *Apprendi* does not apply to exceptional sentences because a separate statutory provision limits the size of such a sentence for particular felonies. The leading

[5] *See Gore*, 143 Wash. 2d at 311-15; *State v. Taylor*, 111 Wash. App. 519, 524-25, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003); *State v. Blakely*, 111 Wash. App. 851, 870-71, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889, *cert. granted*, 124 S. Ct. 429 (2003); *State v. Urlacher*, 111 Wash. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002); *State v. Buchanan*, 110 Wash. App. 1031, 2002 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003); *State v. Ramires*, 109 Wash. App. 749, 37 P.3d 343, 353, *review denied*, 52 P.3d 521 (2002).

Washington Supreme Court case relies on the fact that a sentence in excess of the statutory guidelines may not result in a sentence greater than the ceilings imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wash. 2d at 313-14. For Petitioner's Class B felony conviction, section 9A.20.021(1)(b) precludes the court from imposing an exceptional sentence of greater than 10 years.[6]

The mere fact that Washington law contemplates that some Class B felony convictions might result in a 10-year sentence does not preclude the application of *Apprendi* to sentences in excess of the statutory standard sentencing range. This Court rejected this logic in *Ring*, where the State made an identical argument in connection with Arizona's capital sentencing scheme. Because the Arizona statute "specifies 'death or life imprisonment' as the only sentencing options" for first degree murder, the State argued that the jury's first-degree murder conviction alone authorized the judge to sentence within this "range of punishment" up to and including the death penalty. *Ring*, 536 U.S. at 603-04 (citations omitted).

This Court concluded that *Apprendi* flatly precluded such reasoning:

> This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.

[6] For class A felonies, the sentence may not exceed life imprisonment; for class C felonies, the sentence may not exceed 5 years imprisonment. *See* Wash. Rev. Code § 9A.20.021(1)(a), (c) (2000).

> The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting.

Id. at 604 (citations and quotation marks omitted).

Likewise, the Washington statute "authorizes a maximum penalty of [10 years] only in the formal sense." *Id.* In effect, Washington's sentencing scheme specifically requires a finding of aggravating factors in order to depart upward from the statutory sentencing guidelines. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000).

To accept the logic employed by the Washington courts would truly render *Apprendi* "a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604. Under that approach, a sentence in excess of the otherwise mandatory sentencing range is exempt from *Apprendi* as long as it does not exceed the other, general "statutory maximums" imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wash. 2d at 313-14. But if that is the case, then a state could avoid *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment. In that scenario, ***any*** prison sentence would be within this second "statutory maximum" and, therefore, exempt from *Apprendi*.

Apprendi does not and cannot condone such an absurd result. Rather, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding

of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83). Washington law expressly provides that Petitioner's sentence in excess of the statutory guideline range was contingent on the finding of aggravating circumstances. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000); *Gore*, 143 Wash. 2d at 313. Thus, those circumstances must be found by a jury beyond a reasonable doubt.

2. Washington courts' reliance on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), is misplaced. In *Gore*, the Washington Supreme Court concluded that "the factual determinations that support reasons for exceptional sentences upward fall within the *McMillan* type of case and not the *Apprendi* type" because "[a]ggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty." *Gore*, 143 Wash. 2d at 314.

Contrary to the Washington Supreme Court's reasoning, *McMillan* does not justify refusing to apply *Apprendi* to sentences in excess of statutory standard sentencing ranges. The Washington courts' reliance on *McMillan* is premised on the same formalistic approach that *Apprendi* and *Ring* have explicitly rejected. The aggravating factors upon which an exceptional sentence is based ***do*** "increase the maximum sentence," because without such factors the high end of the standard sentencing range is the highest sentence that may be imposed. As in *Ring*, the conviction of the base offense authorizes a higher sentence "only in a formal sense," because the statute "requir[es] the finding of an aggravating circumstance" before a higher sentence may be imposed. *Ring*, 536 U.S. at 604.

As *Apprendi* expressly recognized, *McMillan* is limited to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the

offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Here, absent aggravating factors, Petitioner's statutory maximum was the top of the sentencing guidelines range (53 months). Because the court imposed a sentence of 90 months, this case does "involve the imposition of a sentence more severe than the statutory maximum established by the jury verdict." *Id.* Thus *Apprendi* requires those aggravating factors to be proven to a jury beyond a reasonable doubt. *McMillan* does not exempt those factors from *Apprendi*'s mandate.

III. The Constitutional Principles Underlying *Apprendi* Require that *Apprendi* Apply in this Context.

The rule set forth in *Apprendi* – that a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be treated as an element of the offense – is necessary to enforce basic constitutional protections for criminal defendants, including proof beyond a reasonable doubt and trial by jury. *See Specht v. Patterson*, 386 U.S. 605 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, this Court made clear that if these protections are to mean anything, they must be such that they cannot be evaded by mere changes in form:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

421 U.S. at 698.

The need to prevent states from evading basic constitutional protections simply by manipulating what facts were defined as "elements" of an offense was at the heart of this Court's mandate in *Apprendi* that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494 (footnote omitted). *Apprendi* based this straightforward rule on the core principle set forth in *Mullaney* that facts resulting in increased culpability and consequences for a criminal defendant cannot be relegated to a lesser array of procedural protections:

> [*Mullaney*] acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed. Because the "*consequences*" of a guilty verdict for murder and for manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of *Winship* merely by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."

Id. at 485 (emphasis in original) (quoting *Mullaney*, 421 U.S. at 697-98 & n.12).

Here, the findings made by the judge at sentencing resulted in substantially more serious consequences for the Petitioner. The judge's conclusion that, by a preponderance of the evidence, Petitioner acted with deliberate cruelty and within the sight or sound of the victim's minor child resulted in a sentence more than ***three years*** longer than the four-and-a-half-year sentence that was authorized absent such

aggravating factors. This is a more severe enhancement than the one that this Court found unconstitutional in *Apprendi*, where the sentence imposed was only two years longer than the ten-year sentence that was authorized without the hate-crime enhancement. *See Apprendi*, 530 U.S. at 468, 471.

The fact that Washington's system deprives defendants of basic constitutional protections is of particular concern where, as here, the findings involve the defendant's *mens rea* – a core component of criminal culpability. The court's finding of deliberate cruelty is a paradigmatic determination of defendants' *mens rea*. As this Court recognized in *Apprendi*, "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. Indeed, all nine Members of this Court in *Apprendi* agreed, at least implicitly, that if racial animus were a *mens rea* instead of a motive, then that fact would have to be proved beyond a reasonable doubt to a jury. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); *accord id.* at 553 (O'Connor, J., dissenting).

Under Washington law, the danger of permitting sentences in excess of the standard sentencing range based on findings made by a judge under a mere preponderance standard is especially acute. Uncharged crimes, distinct from the crime for which a defendant has been properly convicted, may be the basis for imposing an exceptional sentence upward in Washington. *See* Wash. Rev. Code § 9.94A.390 (2000); Wash. Rev. Code § 9.94A.535 (2002); *see also State v. Sanchez*, 69 Wash. App. 195, 205, 848 P.2d 735 (1993) (noting that Washington law "contemplates the imposition of an exceptional sentence based, at least in part, upon acts for which the defendant might have been criminally charged").[7]

[7] For example, Washington law explicitly allows for sentences in excess of the statutory standard range if "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time," Wash. Rev. Code § 9.94A.390(2)(g) (2000); Wash. Rev. Code § 9.94A.535(2)(g) (2002), or if "[t]he current offense involved domestic violence . . . and . . . was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time." Wash. Rev. Code § 9.94A.390(2)(h)(i) (2000); Wash. Rev. Code § 9.94A.535(2)(h)(i) (2002). Moreover, the aggravating factors listed in the relevant statute "are illustrative only and are not intended to be exclusive reasons for exceptional sentences." Wash. Rev. Code § 9.94A.390 (2000); Wash. Rev. Code § 9.94A.535 (2002).

In that circumstance, it is the judge's finding of another crime that allows it to impose a sentence more severe than what is authorized under the facts based solely on the facts established. Thus, failing to apply *Apprendi* to exceptional sentences upward creates a situation where a defendant may be punished for a crime that no jury has considered – much less delivered a verdict of conviction – and for which the *Winship* reasonable doubt standard has not and cannot be met.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and hold that *Apprendi* applies to sentences in excess of statutory standard sentencing ranges, where such exceptional sentences are expressly conditioned on the finding of aggravating factors.

Respectfully submitted,

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